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STATE OF MONTANA 1971

SUPERINTENDENT OF PUBLIC INSTRUCTION

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September 20, 1971

DOLORES COLBURG

To: Dale A. Harris, Executive Director
Montana Constitutional Convention Commission

From: Dolores Colburg Dolores Colburg

This memorandum is submitted in response to several questions you posed concerning Constitutional provisions related to organization of the public school system, public school finances and public aid to non-public schools.

My staff members and I appreciate both the complexity and the importance of the questions you posed; we also recognize the comprehensive research they warrant. Time and resources have limited our study to date, and I know you will understand that this memorandum serves only as preliminary reaction.

In the months prior to and during the Convention, we will continue to compile relevant information and make it available for use by the research analyst and committee on public education. Several staff members are dispatched on research assignments, and we also are planning activities to involve educators statewide in an examination of Constitutional provisions affecting education. I anticipate that both the quality and quantity of accessible information will improve following a "Conference on Education and the Montana Constitution" in mid-November when solidified research can be exchanged and collected. As you know, education is marked with diversity. That diversity, I am sure, will be reflected in the reports submitted for the Commission's consideration.

Although my staff members and I have opinions to offer in regard to the questions you posed, at this juncture we believe opinions would be premature and perhaps distracting. In our research efforts, we are striving for clarity and objectivity to insure maximum benefits for education in Montana. We believe there are a number of alternatives which merit examination. As James B. Conant wrote in his book *Shaping Educational Policy*, "What is needed are strong state boards of education, a first-class chief state school officer, a well-organized state staff and good support from the legislature." This statement recognizes the need for considering the complete administrative system and avoiding judgment of the existing structure and practices in isolation. We will be prepared, of course, to state positions and recommendations when educational matters can be weighed in relation to other concerns, such as governance and financing, during the Constitutional Convention.

The question-and-response series in this memorandum follows the sequence you presented. A bibliography, explanatory notes and raw data are appended. A survey of the provisions and practices in other states is underway, and we also are focusing concentrated research in the area of judicial interpretation.

This memorandum represents only a portion of the study we are conducting. We extend our resources and earnest cooperation in the historic months to follow.

PREFACE

As Superintendent of Public Instruction, I am convinced that the educational needs of Montana can best be served by a state Constitution framed of general principles and guidelines. Details of specification are best suited to statutory law. This approach allows greater flexibility for change and eliminates, from constitutional challenge at least, the myriad problems of interpretation which inevitably arise over specifics.

The changing concepts of education in America deem it essential that state constitutions permit specific designs and requirements to be adaptable to educational needs not only in this decade but in the 21st century as well.

ORGANIZATION OF THE PUBLIC SCHOOL SYSTEM

1. **Should the Constitution define the public school system? Should the Constitution establish school ages and attendance requirements?**

   A. Present Status

   Montana's state Constitution defines the public school system in Article XI, Section 1: "It shall be the duty of the legislative assembly of Montana to establish and maintain a general, uniform and thorough system of public, free, common schools." Section 6 requires that the legislative assembly "provide by taxation, or otherwise, sufficient means . . .to maintain a public, free common school in each organized district in the state, for at least three months in each year." Section 7 establishes school ages: "The public free schools of the state shall be open to all children and youth between the ages of six and twenty-one years."

   B. Comments

   The principle of a public educational system is clearly established, and minimal educational requirements are delineated in the Montana Constitution. However, the concept of minimal educational requirements is in a state of flux. If minimum goals can be interpreted as maximum goals, Constitutional provisions can severely limit the possibility of meeting changing needs in education.

   To illustrate:

   The concept of universal education has changed to include the opportunity for lifelong---pre-school and post-secondary---education. Can it be construed now that public kindergartens or adult education classes would be unconstitutional because children under six years of age or adults more than twenty-one years of age are participating in the educational system?

The recently adopted constitutions of Alaska, Connecticut, Hawaii, Illinois, Michigan and Virginia all contain provisions for a public school system, and their definitions are minimal. However, none of these constitutions establishes school ages or attendance requirements.

To allow flexibility for the growth of Montana's public educational system, I recommend that the delegate assembly consider Constitutional status to establish and to maintain a system of free public schools without a statement of the educational levels of the system. A desirable alternative for a relatively unrestricting definition would be the provision in the Illinois Constitution:

> "A fundamental goal of the People of the State is the educational development of all persons to the limits of their capacities. The State shall provide for an efficient system of high quality public education institutions and services. Education in public schools through the secondary level shall be free. There may be such other free education as the General Assembly provides by law. The State has the primary responsibility for financing the system of public education."

2. **Should the Constitution distinguish the responsibilities and the relationship between the Superintendent of Public Instruction, the State Board of Education and the Department of Public Instruction?**

   A. Present Status

   Montana's Constitution provides for the office of Superintendent of Public Instruction and a State Board of Education but does not relate them except to provide that the Superintendent of Public Instruction serves on the Board as an ex-officio member.

   (See Appendix I for history of the department of public instruction.)

   B. Comments

   Lack of any Constitutional stipulation invites the possibility of conflict or inaction due to confusion of roles, but it also permits specification of relationships to statute and allows the Superintendent and other Board members to design functional and harmonious relationships in conjunction with the legislative branch.

   The question of responsibility must be viewed in perspective with a number of questions which follow relating to the State Board of Education and the Superintendent of Public Instruction. The question essentially deals with the placement of power in regard to education in Montana. Detailed specification in the Constitution regarding the State Board of Education or the Superintendent of Public Instruction could mean subordinating the power of the legislature on educational matters.

3. **Should members of the State Board of Education be elected or appointed? Should the Governor, State Superintendent of Public Instruction and the Attorney General be ex-officio members of the State Board of Education?**

A. Present Status

Article XI, Section 11 specifies the membership of the Board: "The said board shall consist of eleven members, the governor, state superintendent of public instruction and attorney general, being members ex-officio; the other eight members thereof shall be appointed by the governor; subject to the confirmation of the senate, under the regulations and restrictions to be provided by law." Section 75-5602 R.C.M., 1947 as amended, further provides ". . .such appointments shall be subject to the following limitations: (1) they shall be equally divided among the congressional districts of the state of Montana; (2) not more than four (4) shall be affiliated with the same political party or organization; (3) their term shall be eight (8) years and except in the case of a vacancy, only one (1) member shall be appointed each year; and (4) when a vacancy occurs, the governor shall appoint a member for the remainder of the term of the incumbent, and such appointments to fill vacancies shall preserve the balance required by sub-sections (1) and (2)."

B. Appointment of the Board by the Governor

1) Qualified people may be secured to serve, people who might not wish or be able to incur the expenses contingent upon campaigning for an elected office.

2) A board appointed by a governor usually will be in a better position to press for needed educational improvements and support than a board constituted by other means.

3) Unless safeguards are introduced, excessive political control may be introduced and weak candidates chosen. Some safeguards to avoid domination include confirmation of appointments by legislature and overlapping terms and tenure of Board members.

4) However, under the appointment procedure, the electorate does not participate directly in the process of selection.

C. Ex-officio Membership on Board

1) Ex-officio membership of government officials should promote harmonious relationships in educational administration.

2) Coordination of state education activities with other state governmental activities is facilitated.

3) Ex-officio membership of the governor, the chief state school officer and the attorney general introduces a peer relationship which tends to confuse the legisative-executive functions of policy-making and administration and may introduce unnecessary conflicts, especially for the chief state school officer.

4) Ex-officio membership of people holding certain educational and/or governmental administrative positions may allow them to pursue their own narrowly vested interests.

D. Comments

In a section discussing the advantages and disadvantages of particular methods of selecting state board members in *Emerging Designs for Education*, the following statement is worth note:

> "It should be understood at the outset that: (1) methods of selection are ultimately only facilitative and instrumental; (2) no one method is fail-safe or can guarantee success; (3) it is with men as it is with books–a few good ones can make a great deal of difference; and (4) what works in one state may not in another. Yet some means may be more profitable than others in producing effective leadership and in eliminating obstacles to creative service and constructive change."

Alternatives to the current method of selection in Montana include election by the people, election by the legislature, appointment by one house of a bicameral legislature with or without the consent of the other, appointment by the judiciary and joint appointment by the governor and the legislature.

Appendixes II and III may be useful references pertaining to question no. 3.

4. **Should there be separate boards for the public school system and the university system as suggested in the Durham Report or should the present common board be continued?**

From personal experience on the Board, I can testify to the fact that the duties and powers of the Board (Appendix IV) are voluminous and diverse. In addition, the growth of federal educational programs has greatly enlarged the scope and duties of the Board, and the time factor hinders the Board in the fulfillment of its myriad duties.

As Superintendent of Public Instruction and one who is keenly aware of the educational needs of Montana, I strongly recommend the delegate assembly consider a Board of Education concerned solely with the public school system.

I am aware that the Montana University System has submitted a lengthy report on this same question, and I believe that the position expressed in that report deserves positive consideration.

5. **Should the Board of Education be established in the Constitution or by statute?**

6. **Should the office of the Superintendent of Public Instruction be established in the Constitution or by statute?**

I strongly recommend that the Board of Education and the Superintendent of Public Instruction be granted Constitutional status.

I concur with the conclusion expressed in *Emerging Designs for Education* that the ". . .board of education and the chief state school officer should be provided for in the state's constitution, thus helping to remove them from the dangers of excessive political manipulation and control. The protective automony of constitutional status helps to guarantee the state board and its executive officer the opportunity and freedom to interpret with clarity, perceptiveness and conviction to the public, to the educational community and to the political arena, the educational needs of a state without fear of political reprisal or the recriminations of special vested interest groups. State boards without the ability to do this are hardly more than custodial in function."

7. **Should the Superintendent of Public Instruction be an elected official; appointed by the Governor; or appointed by the Board of Education?**

A. Present Status

Article VII, Section 1 of the Constitution provides that the Superintendent of Public Instruction is one of the elected officials comprising the executive department. In addition, Chapter No. 272, Montana Session Laws 1971, Senate Bill No. 274 - Executive Reorganization Act of 1971 82A - 104 (2) reaffirms that the Superintendent of Public Instruction heads a constitutional elected office.

B. Selection by Election

1) An elected official represents the majority will of the people.

2) An elected official is directly responsible to the electorate.

3) An elected official holding a constitutionally established office can work directly for the educational needs of the state, whereas one appointed by the governor may find himself competing with other agencies and departments for priority issues.

4) In Montana, an elected chief state school officer has worked with ease and advantage in the structure of state government.

5) However, competent people in the future may not enter the political field and campaign for a low-salaried position.

B. Comment

The history of Article XXI is interesting and somewhat confusing. Sections 1 through 5 of Article XXI were adopted in 1924, apparently to establish an administrative vehicle for investment of state monies by a single state agency. At that time, funds arising from land grants and other sources defined in Article XI, Section 2 were invested separately by the Board of Land Commissioners. Evidently it was decided, and probably correctly so, that if all state monies available for investment (as prescribed by the legislature as well as the Constitution) were pooled into a single investment fund, greater yield could be obtained on the investment of state monies because of the possibility of larger, longer term investments. However, apparently the initial intent of Article XXI was not able to be put into satisfactory practice, and Sections 6 through 18 were added in 1937. Subsequently, Section 6 (defining which state monies were to be invested as part of the Montana Trust and Legacy Fund) and Section 9 (specifying how the interest earned on such investments was to be allocated back to the sources of investment) were declared to be in violation of the Enabling Act and the Federal Constitution in an Attorney General Opinion of 1939 (A. G. Opinion No. 11, Volume 18). The chief reason for the opinion was that the two sections in combination violated the antidiversionary requirements of the Enabling Act.

Subsequent to Attorney General Opinion No. 11, Volume 18, an advisory opinion concerning the constitutionality of Sections 6 and 9 by the State Supreme Court reversed the Attorney General Opinion holding that, properly construed, Sections 6 and 9 were not unconstitutional although new bookkeeping methods would be required to maintain the proper identity of school funds to remain in keeping with Constitutional provisions. This view was further supported in Attorney General Opinion No. 109, Volume 20, issued in 1943.

In 1963, an advisory opinion handed down by the Supreme Court considered several questions framed by the Legislative Council about administration of the Montana Trust and Legacy Fund. At this point, the situation becomes somewhat confused. The Supreme Court opinion did not take notice of the Attorney General Opinion No. 11, Vol. 18, which declared Sections 6 and 9 of Article XXI to be unconstitutional and thus, to all intents and purposes, void. It seems improbable that this lack of notice (no briefs were kept on the deliberations, so it is not certain that the Attorney General Opinion was not considered, even though it was not cited in the actual opinion) would in any way affect the administrative applications which have been made on the basis of the Supreme Court decision.

This background discussion has been presented in an effort to indicate the sort of difficulty associated with determining what has happened to the "permanent school fund" created in Section 1, Article XXI. It is not in existence at present, although for what reason or for how long it has been defunct, if indeed it ever was in existence (perhaps no donations, gifts, etc., were ever made for the purpose), is not clear.

4. **What effects have the debt limitations on school districts and high school districts in Article XIII, Section 6, had on the construction of public school facilities in Montana?**

5. **What is the debt level of individual school districts in Montana in 1970?**

6. **Should the indebtedness of school districts be regulated by the Constitution or by statute?**

   A. Present Status

   Section 6, Article XIII limits school district bonded indebtedness to 5 percent of taxable valuation.

   B. Comments

   At present, data which would indicate proximities of the bonded indebtedness of the various school districts to their respective upper limits are in the process of being compiled.

   Statewide, elementary and high school bonded indebtedness each was 1.2 percent of assessed valuation for 1970. Based on these figures and on the negligible number of inquiries received by my office for information regarding the limitation and how it can be circumvented, our best estimate is that school districts find the constitutional limitation on bonded indebtedness acceptable. My staff members and I have not identified any significant recurring problems arising from the 5 percent upper limit on bonded indebtedness.

   A recommendation regarding Section 6, Article XIII will be submitted for the delegate assembly's consideration after the study being conducted by my office (to ascertain the extent to which individual school districts are approaching their respective ceilings) has been concluded.

7. **Should the provision in Article XII, Section 1A, earmarking income tax to public schools and state government be retained?**

   A. Present Status

   Article XII, Section 1A states that "The legislative assembly may levy and collect taxes upon the incomes of persons, firms and corporations for the purpose of replacing property taxes. These income taxes may be graduated and progressive and shall be distributed to the public schools and to the state government."

   At present, 25 percent of income taxes and 25 percent of corporation license taxes collected by the state are earmarked by statute (Section 75-6916 R.C.M., 1947) for support of public schools. The exact percentages for distribution of these monies are determined by the legislature.

B. Comment

During the Forty-second Legislative Assembly, legislation was introduced to lower the above percentages to 1 percent. The Constitutional provision prevents complete elimination of earmarking, but it does not prevent the legislature from effectively eliminating the practice by adopting negligible percentage figures for the distribution formula.

If the provision is retained and the legislature were to lower the distribution percentages to a negligible amount, some administrative annoyances would develop. It is inefficient to maintain a separate accounting structure for a "negligible" amount of revenue. If Senate Bill No. 10 had passed during the recent legislature, and it nearly did, less than $600,000 would have been earmarked for public schools for 1971-72. This amount of money probably would not justify the level of accounting activity required for its receipt, handling and distribution.

I recommend the delegate assembly consider specification of at least a minimum guarantee of support if the provision is maintained. It is mandatory that some guarantees for public school funding be provided for in the Montana Constitution.

PUBLIC AID TO NON-PUBLIC SCHOOLS

1. **What is the current judicial interpretation of provisions in the Montana Constitution prohibiting state aid to non-public schools?**

2. **What is the current status of financial aid to non-public schools under the United States Constitution as interpreted by the Supreme Court?**

In regard to the first question, it should be noted that the Montana Constitution which will be drafted must in certain instances conform to the U.S. Constitution. The question of financial aid to non-public schools is one of these cases.

The First Amendment to the U.S. Constitution states that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ." Through a series of rulings beginning as early as 1925, the Supreme Court has held that the rights and liberties protected by the First Amendment are among the fundamental personal rights and liberties protected by the due process clause of the Fourteenth Amendment from impairment by the states. This idea was expanded to include freedom of religion in *Cantwell v. Connecticut*, 310 U.S. 296 (1940). In *Everson v. Board of Education*, 330 U.S. 1 (1947), Justice Black, in delivering the opinion of the Court, said in part that "The First Amendment, as made applicable to the states by the Fourteenth . . .commands that a state 'shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.'" Thus, any provision in the Montana Constitution must recognize that the question of the relationship between church and state must

conform to the Supreme Court's interpretation of the First Amendment. The First Amendment has been incorporated into the Fourteenth Amendment so that its provisions now apply not only to citizens of the United States, but to citizens of individual states as well.

In regard to the second question, financial aid to non-public schools is only one of many issues that have been presented to the Supreme Court dealing with the question of church-state relations. In each instance, the Court has looked primarily to the historical basis of the First Amendment and has ruled on individual questions in light of whether or not the particular instance would lead to the establishment of a particular religion.

In *Everson v. Board of Education*, 330 U.S. 1 (1940) the Court, in a five-to-four decision, upheld the constitutionality of a New Jersey statute which authorized local school districts to make rules and contracts for the transportation of children to schools. The court relied partly on the "child benefit theory"–namely, that in providing these services and benefits the state was aiding the child and not the school which he attends. In addition, the Court stated that a state also is prohibited from hindering religions. The Court reasoned that the transportation of children to their schools is considered in the same category as the provision of police protection near school crossings and other general welfare services. The Court noted that ". . .cutting off church schools from these services, so separate and so indisputably marked off from the religious function would make it far more difficult for the schools to operate. But such is obviously not the purpose of the First Amendment. That Amendment requires the state to be a neutral in its relations with groups of religious believers and non-believers; it does not require the state to be their adversary. State power is no more to be used so as to handicap religions than it is to favor them." In concluding the majority opinion of the Court, Justice Black went on to say: "This Court has said that parents may, in the discharge of their duty under state compulsory education laws, send their children to a religious rather than a public school if the school meets the secular educational requirements which the state has power to impose. See *Pierce v. Society of Sisters*, 268 U.S. 510. It appears that these parochial schools meet New Jersey's requirements. The State contributes no money to the schools. It does not support them. Its legislation, as applied, does no more than provide a general program to help parents get their children, regardless of their religion, safely and expeditiously to and from accredited schools."

The Supreme Court has upheld the constitutionality of state and local governments using tax funds to furnish free textbooks, free lunches and free transportation of pupils of non-public schools. These holdings were based on the view that these programs were in the interest of promoting health, safety and education of children, not in promoting their instruction in religion. The non-public school was, in short, regarded as a distributing agent of welfare services.

The state then may provide either by Constitution or by statute certain aid to non-public schools if this aid can be justified on some welfare service basis and if this aid does not lead to the establishment or prohibition of religion. In addition, this aid must not so entwine the church and the state that the separation of church and state would disappear.

In *Everson v. Board of Education*, cited above, Justice Black said, "The First Amendment had erected a wall between church and state. That wall must be kept high and impregnable. We could not approve the slightest breach." In this case, it was the Court's decision that New Jersey had not breached the separation.

In a more recent decision, the Supreme Court again considered the relationship between church and state and found that the statutes of Rhode Island and Pennsylvania under consideration were unconstitutional under the Religion Clause of the First Amendment, as the cumulative impact of the entire relationship arising under the statutes involved excessive entanglement between government and religion.

On June 28, 1971 Chief Justice Burger delivered the opinion of the Court in *Lemon et al v. Kurtzman*, Superintendent of Public Instruction of Pennsylvania, et al:

> "These two appeals raise questions as to Pennsylvania and Rhode Island statutes providing state aid to church-related elementary and secondary schools. Both statutes are challenged as violative of the Establishment and Free Exercise Clauses of the First Amendment and the Due Process Clause of the Fourteenth Amendment.
>
> "Pennsylvania has adopted a statutory program that provides financial support to non-public elementary and secondary schools by way of reimbursement for the cost of teachers' salaries, textbooks and instructional materials in specified secular subjects. Rhode Island has adopted a statute under which the state pays directly to teachers in non-public elementary schools as a supplement of 15% of their annual salary. Under each statute, state aid has been given to church-related educational institutions as well as other private schools. We hold that both statutes are unconstitutional."

In regard to the Rhode Island statute, the Supreme Court affirmed the decision of the District Court that the Act fostered "excessive entanglement" between government and religion and that the Act had the impermissible effect of giving "significant aid to a religious enterprise" and hence violated the Establishment Clause.

In regard to the Pennsylvania statute, the District Court had upheld the Act. The Supreme Court reversed this decision. In this case, the Court, looking at the cumulative criteria developed over many years, suggested three tests: "First, the statute must have a secular legislative purpose; second, its primary effect must be one that neither advances nor inhibits religion, *Board of Education v. Allen*, 392 U.S. 236, 243 (1968); finally the statute must not foster an excessive government entanglement with religion, *Walz v. Tax Commission*, 397 U.S. 664, 668 (1970)."

Chief Justice Burger, speaking for the Court in *Lemon* (cited above) observed that total separation in the absolute sense was not possible. He sees the line of separation as not a "wall" but an indistinct, blurred barrier depending on all the circumstances of a particular relationship. Certain contacts are permissible, such as fire inspections, building and zoning regulations and compulsory school attendance laws.

The issue in the *Lemon* case was not the merit or benefits of these schools but the relationship which is necessarily demanded between state and church officials. As the Chief Justice stated, "the sole question is whether state aid to these schools can be squared with the dictates of the Religion Clauses. Under our system the choice has been made that government is to be entirely excluded from the area of religious instruction and churches excluded from the affairs of government. The Constitution decrees that religion must be a private matter for the individual, the family and the institutions of private choice and that while some involvement and entanglement is inevitable, lines must be drawn."

It is apparent from studying the Supreme Court's rulings that the question of what constitutes "respecting an establishment of religion" is a difficult variable to define. In the *Lemon* case, the Court did provide three general principles to follow. As Superintendent of Public Instruction, I can only enjoin the Constitutional Convention Commission to become aware of the limitations imposed by the Supreme Court and to caution the delegates that any provisions they draft must conform to the U.S. Constitution in this matter. Specific questions regarding the provision of textbooks, salary incentives, released time and the use of tax monies should be left to the legislature for its discretion.

The one area that has not been challenged since 1925 and that you might wish to examine would be the right of parents to send their children to any school which meets the state's requirements for accreditation of schools and certification of teachers (See *Pierce* cited above).

For your convenience, a list of Supreme Court cases dealing with public aid to non-public school follows:

1. *Pierce v. Society of Sisters*, 268 U.S. 510 (1925)
   Declared unconstitutional an Oregon law requiring all parents to send their children to public schools.

2. *Everson v. Board of Education*, 330 U.S. 1 (1947)
   Reimbursement to parents of non-public school children for transportation is constitutional.

3. *State Board of Education v. Barnette*, 319 U.S. 624 (1943)
   The state may not require students to salute the flag or to recite the pledge of allegiance. (Challenge by Jehovah's Witnesses.)

4. *McCollum v. Board of Education*, 333 U.S. 703 (1948)
   Use of school buildings and school time for religious instruction is unconstitutional.

5. *Zorach v. Clausen*, 343 U.S. 306 (1952)
   Released time for students to attend religious instruction is constitutional.

6. *Engle v. Vitale,* 370 U.S. 421 (1962)
   New York prayer case. Use of prayer in schools was declared unconstitutional.

7. *School District of Abington Township v. Schempp,* 374 U.S. 203 (1963)
   Bible reading in public schools is unconstitutional.

8. *Board of Education v. Allen*, 392 U.S. 236, 243 (1968)
   Use of textbooks for non-public schools is constitutional.

9. *Lemon et al v. Kurtzman et al,* No. 89 Argued March 3, 1971
   Decided June 28, 1971.
   Held unconstitutional statutes in Pennsylvania and Rhode Island which provided for reimbursement to teachers in non-public schools.

APPENDIX I

DEPARTMENT OF PUBLIC INSTRUCTION

A department of public instruction is not established by the Montana Constitution. A former statute (Section 75-1303, R.C.M. 1947) provided for a department of public instruction for organizational purposes, the reference to the department being enacted in 1959:

> "For the purposes of organization of the staff and administration of the duties and services of the superintendent of public instruction, there is hereby created under the office of the superintendent of public instruction a department of public instruction, of which department the superintendent of public instruction shall be the executive and administrative head."

The recodified school laws passed in January, 1971 by the Forty-second Legislative Assembly and signed into law effective January 26, 1971 by the Governor deletes this reference to a department of public instruction.

Under current practice, the staff of the Superintendent of Public Instruction is organized and employed in the Office of the Superintendent of Public Instruction, much as staff is organized and employed in the offices of other state elected officials (the Office of the Governor, the Office of the Attorney General, the Office of the Secretary of State, etc.) without distinction of a separate department.

The newly enacted recodified school laws, Section 75-5704, gives the Superintendent "power to employ, organize, and administer a staff of personnel to assist him in the administration of the duties and services of the office." This section also mandates some particular staff positions. Section 75-5705 provides for discretionary staff by position title whom the superintendent may employ in addition to "any other supervisors or assistants as may be required to carry out the duties of his office."

APPENDIX II

PATTERNS OF SELECTION OF CHIEF STATE SCHOOL OFFICERS AND STATE BOARDS OF EDUCATION

	Chief State School Officer					State Board of Education			
State	Elected CSSO	Appt. CSSO	Term of CSSO	Ex officio member of Board	Official capacity on Board	No. of members and term	Members elected	Members appt. by governor	Ex officio members
Alabama	x		4-year	x	Secretary & exec. officer	-11- 9 for 6-yr. overlapping terms 2 state government officials who serve ex officio		9 (confirmation of Senate)	State supt., governor
						No one may be appointed who is in any way subject to Board's authority.			
Alaska		By Board with approval of gov.	5-year		Exec. officer	-7- 5-yr. over-lapping terms		All (confirmation of Legislature) 1 from each of 4 judicial dists. 3 at large	
						No more than 4 from the political party of the governor. At least one member must represent state-operated rural schools.			
Arizona	x		2-year	x	Secretary	-9- 8 for 4-yr. terms 1 state government official who serves ex officio		3 lay members; 5 prof.members: pres.,st. univ. or st. coll.; Brd. mem.,st.jr. coll.; supt., hi.sch.dist.; county supt.; teacher	State supt.

Chief State School Officer						State Board of Education			
State	Elected CSSO	Appt. CSSO	Term of CSSO	Ex officio member of Board	Official capacity on Board	No. of members and terms	Members elected	Members appt. by governor	Ex officio members
Arkansas		By Board	At pleasure of Board		Agent & secretary	-9- 9-yr. over-lapping terms		All, 1 from each of the 6 Cong. districts, 3 at large (with confirmation of Senate)	
California	x		4-year		Secretary & exec. officer	-10- 4-yr. over-lapping terms		All (consent of Senate)	
Colorado		By Board	At pleasure of Board		Secretary	-5- 6-yr. over-lapping terms	All, from 4 Cong. districts and 1 at large (partisan ballot)		
Connecticut		By Board	At pleasure of Board		Secretary & exec. officer	-9- 6-yr. over-lapping terms		At least 1 from each county	
						Not more than 2/3 of members from same party.			
Delaware		By Board	1-year		Executive secretary	-8- 6 for 3-yr. over-lapping terms 2 representatives of higher ed. who serve in advisory capacity ex officio		All	Pres., Del. St. Coll.; Pres., Univ. of Del.
						Not more than 3 members from same political party.			

Chief State School Officer						State Board of Education			
State	Elected CSSO	Appt. CSSO	Term of CSSO	Ex officio member of Board	Official capacity on Board	No. of members and terms	Members elected	Members appt. by governor	Ex officio members
Florida	x		4-year	x	Secretary & exec. officer	-5- All state government officials who serve ex officio			State supt., governor, sec. of state, attorney gen., st. treasurer
Georgia	x		4-year		Executive officer, executive secretary, & agent	-10- 7-yr. overlapping terms		All (consent of Senate)	
Hawaii		By Board	At pleasure of Board		Executive officer & secretary	-11- 4-yr. concurrent terms	-11- 3 represent Oahu at large; 8 represent 7 dists. within state (2 for island of Hawaii)		
Idaho	x		4-year	x	Executive secretary	-8- 7 for 5-yr. overlapping terms 1 ex officio		-7-	State supt.
						Members appointed without regard to party or religion.			

Chief State School Officer						State Board of Education			
State	Elected CSSO	Appt. CSSO	Term of CSSO	Ex officio member of Board	Official capacity on Board	No. of members and terms	Members elected	Members appt. by governor	Ex officio members
Illinois	x		4-year		Executive officer for vocational education on the Vocational Education Board	No state board for elementary and secondary education			
Indiana	x		2-year	x	President & chairman of 3 commissions	-19- 18 for 4-yr. overlapping terms 1 state government official who serves ex officio		18, six on each of 3 commissions (Gen. Education, Textbook Adop., Teacher-Training and Licensing)	State supt.
						At least 4 members of each commission must be actively employed in the schools of the state. Not more than 4 members on one commission from same political party.			
Iowa		By Board	4-year		Executive officer	-9- 6-yr. overlapping terms. No member can serve more than 1 successive term.		9 appointed by gov. with approval of 2/3 of Senate	
						No person is eligible who is engaged in professional education for the major part of his time or who derives a major portion of his income from any business or activity connected with education. No more than 5 members from the same political party.			

Chief State School Officer						State Board of Education			
State	Elected CSSO	Appt. CSSO	Term of CSSO	Ex officio member of Board	Official capacity on Board	No. of members and terms	Members elected	Members appt. by governor	Ex officio members
Kansas	x		2-year		Board is advisory to CSSO	-7- 3-yr. overlapping terms. No member may serve more than 2 successive terms.		All (1 member from each Cong. district & the balance at large)	
	Under a law passed in 1966, effective 1969, chief state school officer will be appointed by 10-member elected Board.					No more than 4 members from same political party. No person engaged in school work as a teacher, principal, or superintendent is eligible to be appointed to serve.			
Kentucky	x		4-year		Executive officer	-7- 4-yr. over-lapping terms		7	
						All lay members. No person is eligible if he holds or discharges the duties of any civil or political office, deputyship, or agency under the city or county of his residence. No member can be directly or indirectly interested in the sale to the Board of books, stationery, or other property, materials, supplies, equipment, or services for which school funds are expended.			
Louisiana	x		4-year		Executive officer & secretary	-11- 3 for 6-yr. overlapping terms 8 for 8-yr. over-lapping terms	All (3 from public service commission districts, 8 from Congress. districts)		
Maine		By Board	At pleasure of Board		Executive officer & secretary	-10- 5-yr. over-lapping terms		All (advice & consent of Exec. Council)	

Chief State School Officer						State Board of Education			
State	Elected CSSO	Appt. CSSO	Term of CSSO	Ex officio member of Board	Official capacity on Board	No. of members and terms	Members elected	Members appt. by governor	Ex officio members
Maryland		By Board	4-year		Chief executive, secretary, & treasurer	-7- 7-yr. overlapping terms No person is selected who is in any way subject to the Board's authority.		All	
Massachusetts		By Board	At pleasure of Board		Executive & administrative head	-13- 11 for 5-yr. overlapping terms 2 education representatives who serve ex officio (without vote)		All (advice of Advisory	chancellor, Board of Higher Ed., (without vote); research director, Advisory Council on Education, (without vote)
Michigan		By Board	As determined by Board		Chairman	-10- 8 for 8-yr. terms prescribed by law 2 state officials ex officio (without vote)	All, nominated by party convention & elected at large		Governor (without vote), state supt. (without vote)
Minnesota		By Board (conf. by Sen.)	6-year		Executive officer & secretary	-9- 6-yr. overlapping terms		All	

Chief State School Officer						State Board of Education			
State	Elected CSSO	Appt. CSSO	Term of CSSO	Ex officio member of Board	Official capacity on Board	No. of members and terms	Members elected	Members appt. by governor	Ex officio members
Mississippi	x		4-year	x	Presides at all meetings	-3- All state government officials who serve ex officio			State supt., sec. of state, attorney gen.
Missouri		By Board	At pleasure of Board		Chief administrative officer	-8- 8-yr. overlapping terms		All (advice & consent of Senate)	
						All lay members. At no time more than 4 members from same political party.			
Montana	x		4-year	x	Secretary	-11- 8 for 8-yr. overlapping terms 3 state government officials who serve ex officio		8 (consent Senate)	State supt., governor, attorney gen.
						Not more than 4 members from same political party and equally divided between 2 Congressional districts.			
Nebraska		By Board	At pleasure of Board		Executive officer	-8- 4-yr.overlapping terms	All, 1 from each of 8 districts (nonpartisan ballot)		
						No person is eligible who is actively engaged in the teaching profession.			

Chief State School Officer						State Board of Education			
State	Elected CSSO	Appt. CSSO	Term of CSSO	Ex officio member of Board	Official capacity on Board	No. of members and terms	Members elected	Members appt. by governor	Ex officio members
Nevada		By Board	At pleasure of Board		Secretary	-8- 4-yr.over-lapping terms	6,one from each of ed. supervision districts, 2 repre-senting labor & agri. appt. by elected members		
						All lay members.			
New Hampshire		By Board	At pleasure of Board		Chief executive officer & secretary	-7- 5-yr. over-lapping terms		All, appt. by gov. & advisory council which is elected biannually on partisan ballot	
						Members may not be technical educators nor persons professionally engated in school work.			
New Jersey		By gov. (conf. by Sen.)	5-year		Official agent for all purposes	-12- 6-yr. over-lapping terms		All (consent of Senate)	
						At least 3 members must be women.			
New Mexico		By Board	At pleasure of Board		Adminis-trative & executive functions	-10- 6-yr. over-lapping terms	All, 1 from each of 10 judicial districts		

Chief State School Officer						State Board of Education			
State	Elected CSSO	Appt. CSSO	Term of CSSO	Ex officio member of Board	Official capacity on Board	No. of members and terms	Members elected	Members appt. by governor	Ex officio members
New York		By Board	At pleasure of Board		Chief executive officer	-15- 15-yr. overlapping terms	All, by state Legislature, 1 from each of 11 judicial dists. & 4 at large		
						No member may be a president, principal, or any other officer of an institution belonging to the University of the State of New York.			
North Carolina	x		4-year	x	Secretary	-13- 10 for 8-yr. overlapping terms 3 state government officials who serve ex officio		10, one from each of 8 educational districts, 2 at large (confirmation by general assembly in joint session)	State supt., lieutenant gov., st. treasurer
						A majority of the members are to be persons of training and experience in business & finance who are not connected with the teaching profession or any educational administration of the state.			
North Dakota	x		4-year	x	Executive director & secretary	-7- 6 for 6-yr. overlapping terms 1 state government official who serves ex officio		6, one from each of the 6 judicial districts (with consent of Senate)	State supt.
						One member nominated by the state educational association, 1 by the state school officers association. At all times 2 members should be members of state school boards association.			

	Chief State School Officer					State Board of Education			
State	Elected CSSO	Appt. CSSO	Term of CSSO	Ex officio member of Board	Official capacity on Board	No. of members and terms	Members elected	Members appt. by governor	Ex officio members
Ohio		By Board	At pleasure of Board		Secretary, executive, & chief administrative officer	-24- 6-yr. overlapping terms	All, from 24 Cong. districts (nonpartisan ballot)		
						A member shall not during his term of office be an employee or officer of any public or private college, university, or other institution of higher education.			
Oklahoma	x		4-year	x	President & executive officer	-7- 6 for 6-yr. overlapping terms 1 state government official who serves ex officio		6 (consent of Senate)	State supt.
Oregon	x		4-year		Administrative officer	-7- 7-yr. overlapping terms		All (confirmation of Senate)	
						The governor must select resident citizens of Oregon not engaged in school teaching, administration, or operation.			
Pennsylvania		By gov.	4-year		Chief executive officer	-17- 6-yr. overlapping terms		All (consent of Senate) 7 serve on Council of Higher Educ.; 7 on Council of Basic Education; 3 serve at large	
						None of the members serving at large & not more than 2 members on each of 2 councils (Basic Ed. & Higher Ed.) shall be employed in a school system, the Dept. of Public Instruction, or any educational institution. At least 2 members on each Council shall have had previous experience in technical ed. or training.			

	Chief State School Officer					State Board of Education			
State	Elected CSSO	Appt. CSSO	Term of CSSO	Ex officio member of Board	Official capacity on Board	No. of members and terms	Members elected	Members appt. by governor	Ex officio members
Rhode Island		By Board	5-year		Executive officer	-7- 7-yr. overlapping terms		All	
South Carolina	x		4-year		Secretary & administrative officer	-16- 4-yr. overlapping terms	All, by legislative delegation of counties included in each of 16 judicial districts		
South Dakota	x		2-year		Executive secretary & executive officer	-7- 5-yr. overlapping terms		All	
						No one is eligible who is engaged in the educational profession or is a member of any state board of higher education.			
Tennessee		By gov.	4-year	x	Chairman	-14- 12 for 6-yr. overlapping terms 2 state government officials who serve ex officio		12-four from each grand division	State comm., governor

Chief State School Officer					State Board of Education			
State	Elected CSSO	Appt. CSSO	Term of CSSO	Ex officio member of Board	Official capacity on Board	No. of members and terms	Members elected	Members appt. by governor	Ex officio members
Texas		By Board	4-year		Executive officer & executive secretary	-21- 6-yr. over-lapping terms	All, from 21 Cong. districts as constituted in 1949		
						Members cannot be engaged in organized educational activity or hold office in state or political subdivision.			
Utah		By Board	At pleasure of Board		Executive officer	-9- 4-yr. over-lapping terms	All, 1 from each election district. Unexpired term filled by appt. by regional convention of members of district school boards		
Vermont		By Board	At pleasure of Board		Chief executive officer & secretary	-7- 6-yr. over-lapping terms		All (consent of Senate)	
						At least 2 members must be women.			
Virginia		By gov.	4-year		Secretary	-7- 4-yr. over-lapping terms		All (consent of Senate)	

Chief State School Officer						State Board of Education			
State	Elected CSSO	Appt. CSSO	Term of CSSO	Ex officio member of Board	Official capacity on Board	No. of members and terms	Members elected	Members appt. by governor	Ex officio members
Washington	x		4-year		President	-14- 6-yr. overlapping terms	All, by brds. of directors of sch. districts in the 7 Cong. districts on population (no. of students) basis		
						No person employed in any school, college, university, or other educational institution or in any county superintendent's office or in the office of the Supt. of Public Instruction is eligible.			
West Virginia		By Board	At pleasure of Board	x	Chief executive officer	-10- 9 for 9-yr. overlapping terms 1 state government official who serves ex officio (without vote)		9 (consent of Senate)	State supt. (without vote)
Wisconsin	x		4-year			No state board for elementary and secondary education			
Wyoming	x		4-year	x		-10- 9 for 6-yr. overlapping terms 1 state government official who serves ex officio (without vote)		9 appointed by governor (with approval of Sen.) 7 are lay members from each judicial district; 1 teacher and 1 administrator at large	State supt. (without vote)
						Not more than 5 members from one political party.			

Chief State School Officer						State Board of Education			
State	Elected CSSO	Appt. CSSO	Term of CSSO	Ex officio member of Board	Official capacity on Board	No. of members and terms	Members elected	Members appt. by governor	Ex officio members
American Samoa		By gov.		x		-8- 3 appointed by 5 territorial government officials who serve ex officio		-3- representing 3 districts	Dir. of ed., attorney gen., pub. health officer, chief justice, pub. works officer
Canal Zone		By gov.				No territorial board for elementary and secondary education.			
Guam		By Board with approval of gov.	2-year		Executive secretary	-7- 3-yr. overlapping terms		-7-	
Puerto Rico		By gov. with consent of Senate				No board for elementary and secondary education			
Trust Territory		By high commissioner	Civil Service appointment			No territorial board for elementary and secondary education			

Chief State School Officer						State Board of Education			
State	Elected CSSO	Appt. CSSO	Term of CSSO	Ex officio member of Board	Official capacity on Board	No. of members and terms	Members elected	Members appt. by governor	Ex officio members
Virgin Islands		By gov.	CSSO serves only for term of gov. who appoints him	x		-10- 9 for 2-year terms 1 insular government official who serves ex officio		-9-	Commissioner of education

Compiled by Council of Chief State School Officers, August 1968.

APPENDIX III

FREQUENCY, METHODS OF SELECTION AND STRUCTURES FOR ADMINISTRATION OF EDUCATION AT THE STATE LEVEL[1]

	5 States	14 States	11 States	14 States	No States	4 States
GOVERNOR	E	E	E	E	E	E
CHIEF STATE SCHOOL OFFICER	E	E	AB	AB	AG	AG
BOARD MEMBERS	E	AG	E	AG	E	AG

Legend: E-Elected AB-Appointed by Board AG-Appointed by Governor

Note: Two states--Illinois and Wisconsin--have been omitted from the chart above. In 1971, Illinois changed from election to appointment of the chief state school officer, but methods of selection have not yet been determined for Board of Education members. Wisconsin has no state board for elementary and secondary education.

[1]Data obtained from Book of the States 70-71, Council of State Governments, and from Fuller et al, Education in the States, Nationwide Development Since 1900, A Project of the Council of Chief State School Officers, 1968.

APPENDIX IV

POWERS AND DUTIES OF THE BOARD OF EDUCATION

75-5606. Ex officio regents. The board of education shall serve ex officio as the regents of the Montana university system. As the regents, they shall have the power and shall perform all duties prescribed by the higher education provisions of this title. All such duties shall be performed in the name of the regents of the Montana university system.

History: En. 75-5606 by Sec. 7, Ch. 5, L. 1971.

Cross-References

Powers and duties of board as ex officio regents, sec. 75-8501.

Units constituting university system, sec. 75-8403.

75-5607. Powers and duties. The board of education shall have the power and it shall be its duty to:

(1) effect an orderly and uniform system of teacher certification and for the issuance of an emergency authorization of employment by adopting the policies prescribed by sections 75-6002 and 75-6011;

(2) consider the suspension or revocation of teacher certificates, and appeals from the denial of teacher certification in accordance with the provisions of section 75-6010;

(3) administer and order the distribution of state equalization aid in accordance with the provisions of section 75-6917;

(4) adopt and enforce policies to provide uniform standards and regulations for the design, construction, and operation of school buses in accordance with the provisions of section 75-7004;

(5) approve or disapprove a reduction of the number of hours in a district's school day in accordance with the provisions of section 75-7403;

(6) adopt policies prescribing the conditions when school may be conducted on Saturday, and the types of pupil-instruction-related days and approval procedure for such days in accordance with the provisions of sections 75-7404 and 75-7405;

(7) adopt standards of accreditation and establish the accreditation status of every school in accordance with the provisions of sections 75-7501 and 75-7502;

(8) establish the scope of conservation education in the schools in accordance with the provisions of section 75-7509;

(9) approve or disapprove educational media selected by the superintendent of public instruction for the educational media library in accordance with the provisions of section 75-7511;

(10) as the governing board of the state of Montana for vocational education, adopt the policies prescribed by and in accordance with the provisions of section 75-7702;

(11) consider applications for post-secondary vocational-technical center designation in accordance with the provisions of section 75-7707;

(12) for the purposes of post-secondary vocational-technical centers, approve or disapprove programs and budgets, direct the distribution of

moneys in support of such budgets, determine tuition rates and fees, enter into lease agreements or real property purchases in accordance with the post-secondary vocational-technical center provisions of the vocational education chapter of this Title;

(13) adopt policies for the conduct of special education in accordance with the provisions of section 75-7802;

(14) supervise community college districts in accordance with the provisions of sections 75-8103 and 75-8119;

(15) call an election, determine the results of the election, order and implement the organization of a community college district in accordance with the community college districts chapter of this Title; and

(16) perform any other duty prescribed from time to time by this Title or any other act of the legislature.

History: En. 75-5607 by Sec. 8, Ch. 5, L. 1971.

Cross-References

Board as head of department of education, sec. 82A-501.

Functions continued in board of education, sec. 82A-506.

Recreational programs and parks, authority of board where school property utilized, sec. 62-214.

State school for deaf and blind, duties of board, sec. 80-101 et seq.

Collateral References

Schools and School Districts⊂=47.

78 C.J.S. Schools and School Districts § 90.

47 Am. Jur. 324-326, Schools, §§ 42-44.

75-5608. Other powers and duties. The board of education shall have the power and it shall be its duty to:

(1) adopt rules and regulations, not inconsistent with the constitution or laws of the state of Montana, necessary for its own government or the proper execution of the powers and duties conferred upon it by law;

(2) adopt and use an official seal to authenticate its official acts;

(3) keep a record of its proceedings; and

(4) submit a written report to the governor of its activities during the immediately preceding fiscal biennium in accordance with the provisions of section 82-1002, R. C. M., 1947.

History: En. 75-5608 by Sec. 9, Ch. 5, L. 1971.

Actions Ex Contractu against Board of Education

Board of education may be sued for a breach of contract without consent of state to the action. Means v. State Board of Education, 127 M 515, 267 P 2d 981, 983.

Collateral References

Schools and School Districts⊂=47.

78 C.J.S. Schools and School Districts § 90.

47 Am. Jur. 326, Schools, § 45.

APPENDIX V

METHODS OF SELECTING THE CHIEF STATE SCHOOL OFFICER FOR SELECTED YEARS FROM 1900 TO 1967[1]

Method	1900	1910	1920	1930	1940	1950	1960	1967[2]
By the people	31	33	34	33	32	29	23	22
By governor	7	7	6	7	8	6	5	4
By state board of education	3	4	8	8	8	13	22	24
By general assembly	3	1	-	-	-	-	-	-
By ex officio designation	1	1	-	-	-	-	-	-

[1]Robert F. Will, State Education, Structure and Organization (Washington, D. C.: Government Printing Office, 1964), p. 20.

[2]Data for 1967 from reports in the office of the Council of Chief State School Officers, 1201 Sixteenth Street, N. W., Washington, D. C.